INDEX

OPINION BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTE INVOLVED 2
CONSTITUTIONAL PROVISION INVOLVED 3
STATEMENT 3
REASONS FOR GRANTING THE WRIT 4
CONCLUSION 7
APPENDIX A-1

CITATIONS

CASES:

Columbia Broadcasting System v. U.S., 316 U.S. 407 6
Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 6
Himfar v. U.S., 174 Ct. Cl. 209 5
Industrial Uranium Company v. U.S. __ Ct. Cl. __, (No. [illegible] decided May 12, 1967) 5
Lomba[illegible] v. Louisiana, 373 U.S. 267 6
MacArthur Mining Co., Inc. v. U.S., 167 Ct. Cl. 143 6
Newman v. U.S., 143 Ct. Cl. 784 6
Padloc v. U.S., 161 Ct. Cl. 393 5
Radium Mines, Inc. v. U.S., 139 Ct. Cl. 144 5
Service v. Dulles, 332 U.S. 363 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

IRVING SILVER,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Carl L. Shipley and Rufus W. Peckham, Jr., attorneys for Irving Silver, petitioner herein, respectfully request on his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled cause.

OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered by the Court below is in the United States Court of Claims, No. 65-66 decided May 15, 1967, and is set out *infra* in the appendix at page A-1.

JURISDICTION

As ground on which to invoke the jurisdiction of this Court, petitioner relies upon Title 28 U.S. Code, Section 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 are:

The opinion of the Court below decides an important question of federal law which has not been, but should be, settled by this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Was it a violation of due process of law to discharge a federal probationary employee on allegations of unsatisfactory performance and attitude, when the employing agency had failed to accord him the on-the-job training which it had promised him as an inducement to accept the employment in the first place?

REGULATION INVOLVED

Title 5, Code of Federal Regulations, Section 9.103(a) (1961 Ed.) provides in pertinent part:

> "Any employee serving a probationary or trial period shall be given a full and fair trial in the performance of the duties of the position to which appointed."
>
> (Repealed May 19, 1962, 27 FR 4759)

Title 5, Code of Federal Regulations, Section 315.803 (1964 Ed.) provides:

> "The agency shall utilize the probationary period as fully as possible to determine the fitness of the em-

ployee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment."

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5:

> "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

STATEMENT

On June 3, 1963, petitioner commenced employment as a Revenue Officer, GS-1169-07, with the Internal Revenue Service at the District Office in New York City. This employment was a career appointment under a permanent appropriation and was subject to completion of a one-year probationary or trial period commencing that same date.

At the time of this employment, petitioner had career status with approximately 22 years of prior federal service and was a veteran entitled to the benefits of the Veterans Preference Act.

Although petitioner was appointed to the position on the basis of a federal entrance examination, he acted in reliance on an official Treasury Department recruiting circular which stated:

> "If you are appointed as a Revenue Officer you will enter on a 6-month internship. You will be given several weeks of classroom instruction under instructors who are authorities in their fields. Your classroom work will include intensive study of tax law, fundamentals of business management, accounting principles, business law, powers of enforcement, financial institutions and instruments, and Internal Revenue procedures. During the remainder of the internship period you will be assigned to a planned program of on-the-job training and under careful guidance of highly skilled professionals you will be taught how to apply what you have learned in class."

(Additional portions of this circular are reproduced *infra* in the appendix at page A-2).

On June 1, 1964, only two days before petitioner would have acquired permanent status, he was dismissed from his position on grounds of unsatisfactory work performance and attitude.

Thereafter petitioner appealed this action through the appropriate levels of the Treasury Department and the Civil Service Commission, all of which sustained the dismissal action.

On February 22, 1966, petitioner filed a petition in the United States Court of Claims, which was subsequently amended on September 1, 1966, seeking judgment for his alleged unlawful termination of employment. That Court in its Order of May 15, 1967, (*infra* appendix p. A-1) denied petitioner's motion for summary judgment; granted respondent's cross-motion for summary judgment and dismissed petitioner's petition.

This petition for a writ of certiorari follows therefrom.

REASONS FOR GRANTING THE WRIT

The gravamen of Court of Claims opinion was ". . . that there is no substance to the claims that the reason given for plaintiff's dismissal was unsupported or that he was not given the proper training or schooling . . ." This petition, therefore, addresses itself primarily to the premise that petitioner's claim that he did not receive proper training and/or schooling, despite respondent's undertaking to provide same, was supported by substantial evidence and that it was error for the Court of Claims to ignore that evidence.

When petitioner initially applied for his employment with the Internal Revenue Service, he did so in response to and in reliance upon certain representations and undertakings contained in an official departmental recruiting circular, a copy of which is reproduced *infra* at page A-2 of the appendix. It will be noted that certain affirmative representations are advanced therein in regards to instruction, pro-

cedures, on-the-job training, etc., etc. It is petitioner's contention, and it is believed that the record below unequivocally substantiates, that this promised instruction, schooling and on-the-job training was never tendered; hence it is not surprising that plaintiff was unable to attain the desired standards of his position. It is petitioner's contention that the Internal Revenue Service's training methods, or rather the lack thereof, was the direct cause of his unsatisfactory performance. Respondent should be held to the terms of its circular, *Industrial Uranium Company v. United States*, __ Ct. Cl. __ (No. 258-60; decided May 12, 1967).

Although 5 CFR 9.103, requiring "a full and fair trial," was repealed prior to petitioner's employment, it is submitted that that same standard is implicit in the current regulation, 5 CFR 315.803, which directs the agency to "utilize the probationary period as fully as possible." Surely full utilization may be legitimately construed to embrace a full and fair trial. Yet, in this case the record below shows that petitioner was afforded no such thing. When petitioner was first informed of his separation, he responded with a lengthy and detailed statement (Plaintiff's Exhibits 4 and 5 affixed to Plaintiff's Motion for Summary Judgment) explaining the reason for his alleged poor performance. The Internal Revenue Service apparently paid no attention to petitioner's explanation, let alone his repeated requests for the promised training.

It is petitioner's contention that the recuriting circular was a contractual offer binding upon the respondent [*Radium Mines Inc. v. U.S.*, 139 Ct. Cl. 144 (1957)] because the language of the circular reasonably induced significant action by the petitioner [*Padloc v. U.S.*, 161 Ct. Cl. 393 (1963)]. See also *Himfar v. U.S.*, 174 Ct. Cl. 209 at page 215 (1966).

Respondent, in the proceedings below (page 9, Defendant's Cross-Motion for Summary Judgment) candidly admits that it "does not believe that plaintiff's attitude could have been changed by training." Surely this is an implied admission

that the promised training was never tendered in the first place.

Even if this Court should determine that the recuriting circular was not a contractual undertaking, then at the very least it must be interpreted as a statement of Federal policy. This Court has already held that when an agency of government plainly states a policy, it must be treated exactly as if it had an ordinance. *Lombard v. Louisiana*, 373 U.S. 267. The Federal Government is bound by its own policies and rules the same as if they were Federal Law, *Service v. Dulles*, 332 U.S. 363; *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380; *CBS v. U.S.*, 316 U.S. 407; *Newman v. U.S.*, 143 Ct. Cl. 784; *MacArthur Mining Co., Inc. v. U.S.*, 167 Ct. Cl. 143. If the circular be viewed as a statement of policy then this case must fall within the *MacArthur* decision which in turn recognized the same principal of law adverted to in *Lombard*. Just as the *MacArthur* policy was to encourage operation of marginal mines so then was the policy in this case to encourage applicants to positions in the Internal Revenue Service. Plaintiff acted in reliance thereon to his detriment. He left a position with career status in reliance on an apparent determination that he was qualified and trainable. Now he had neither position nor status due to the Government's failure and refusal to keep its word and implement its policy. It strains the bounds of credulity to believe that an honorably discharged war veteran with twenty-two years of faithful and continuous Federal civil service all of a sudden became impossible to train.

CONCLUSION

Wherefore, the premises considered, petitioner submits that there are special and important reasons justifying grant of a writ of certiorari in this case.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF CLAIMS

No. 65-66

IRVING SILVER

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

This case comes before the court on plaintiff's motion and defendant's cross-motion for summary judgment. Upon consideration thereof, together with the opposition and responses thereto, and the briefs of the parties, without oral argument, it is concluded that no procedural errors have been alleged or shown and that there is no substance to the claims that the reason given for plaintiff's dismissal was unsupported or that he was not given the proper training or schooling, and,

IT IS ORDERED that defendant's cross-motion for summary judgment be and the same is granted, plaintiff's motion for summary judgment is denied and plaintiff's petition is dismissed.

BY THE COURT

Wilson Cowen
Judge

May 15, 1967

[Exhibit No. 2]

THE REVENUE OFFICER'S JOB

Do you enjoy dealing with people? Do you like to receive an assignment and complete it on your own? Would you rather spend most of your working hours outside the office? Do you enjoy a challenge to your ingenuity and resourcefulness? If you can answer "yes" to these questions, you will enjoy working as a Revenue Officer.

As a Revenue Officer you will call on taxpayers from all walks of life, the individual wage earner, the small businessman, the executive of a large commercial enterprise, professional men, and others. In contacting the taxpayer, at his home or place of business, you will examine records of all types, obtain and analyze information regarding business situations, negotiate arrangements to satisfy taxpayer obligations and perform similar types of work of a diversified nature to protect the Government's interests.

If you are appointed as a Revenue Officer you will enter on a 6-month internship. You will be given several weeks of classroom instruction under instructors who are authorities in their fields. Your classroom work will include intensive study of tax law, fundamentals of business management, accounting principles, business law, powers of enforcement, financial institutions and instruments, and Internal Revenue procedures. During the remainder of the internship period you will be assigned to a planned program of on-the-job training and under careful guidance of highly skilled professionals you will be taught how to apply what you have learned in class.

When you have successfully completed this 6-month internship you will be assigned to the work for which you have been trained. If your starting salary is $4,690 a year, you will also be promoted and your salary increased to $5,795. Thus, your earnings the first year will average around $100 a week.

The progressively more responsible duties and advanced training to which you will then be assigned are carefully planned to develop your skills and ability to shoulder journeyman Revenue Officer responsibilities as rapidly as possible. If your starting salary is $5,795, and you develop as expected, you will normally receive your promotion to the journeyman level at the end of your first year of service and your salary will be increased to $7,030 a year. A trainee whose starting salary is $4,690 a year will normally develop and earn promotions so that he will reach the journeyman level of development and attain a salary of $7,030 after 18 months of training.

ADVANCED TRAINING

* The advanced training you receive following your internship will include instruction in human relations, communications, business problems, public relations, enforcement procedures and techniques, evidence and procedure, preparation and analysis of financial statements, and related subjects. As you develop you will be given continuing training in technical subjects such as liens and levies, property rights, summons procedures, seizure and sale of property, receiverships, bankruptcies, and other similar matters. Our aim – your development and advancement – to full productive and earning capacity – as rapidly as possible. Supervisory, mid-management, and executive development training is offered for Revenue Officers who demonstrate potential for supervisory and high level positions.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 546

IRVING SILVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The petitioner, a veteran, received a career appointment with the Internal Revenue Service (I.R.S.) as a Revenue Officer, GS–7, on the basis of a federal entrance examination. The appointment commenced on June 3, 1963, and was subject to a one-year probationary period. Petitioner was notified that his appointment was terminated as of June 1, 1964, by a letter of separation from the New York District Director dated May 26, 1964. In accordance with 5 C.F.R. 315.804 (1964 ed.), the following reasons were given for termination (R. 3):[1]

[1] "R." references are to the record in the Court of Claims, which has been filed in this Court.

280-558—67——1

> * * * your work performance and attitude have been unsatisfactory due to your failure to absorb and practice the fundamentals of Delinquent Account servicing procedure in the field; your indifferent attitude toward your work; your failure to follow instructions and to take initiative and follow through to a conclusion on Taxpayer Delinquent Accounts; and your inability to perform adequately under other than exceptionally close supervision, all of which serve as evidence of your inability to perform the duties of a Revenue Officer.

Subsequently, at petitioner's request, the District Director conducted an investigation of the dismissal, and determined that petitioner had been afforded every opportunity to demonstrate fitness for the job, but that, after several admonitions, petitioner's continued poor work performance and attitude made separation from the I.R.S. necessary (R. 51). Petitioner was given an opportunity, in a meeting with the District Director, to rebut statements contained in the notice of May 26, 1964; petitioner confined himself to asserting that he had received no on-the-job supervision, that he had never been advised of his poor performance by his instructors, and that he had not received proper instruction. Petitioner's supervisor presented evidence of numerous field trips, and interagency evaluations, memoranda and records in support of petitioner's separation. The District Director concluded that the separation recommendation was correct. R. 42.

On February 22, 1966, petitioner instituted this suit in the Court of Claims seeking to recover a sum

equivalent to the salary he would have received during the period from the time of his discharge to the present. Both parties moved for summary judgment. In support of his motion, petitioner argued that his dismissal violated 5 C.F.R. 9.103(a) (repealed 1962) and 5 C.F.R. 315.803 (1964 ed.) in that he was not given the proper training for his job and thus did not receive a "full and fair trial in the performance of [his] duties" (5 C.F.R. 9.103(a)). Petitioner also urged that the training that he received was less adequate than that promised in a Treasury Department recruiting circular (Pet. App. A–2–3) on which he had relied in taking the job. On May 15, 1967, the Court of Claims dismissed petitioner's suit, finding that "no procedural errors have been alleged or shown and that there is no substance to the claims that the reason given for plaintiff's dismissal was unsupported or that he was not given the proper training or schooling" (Pet. App. A-1).

2. The petition "addresses itself primarily to the premise that petitioner's claim that he did not receive proper training and/or schooling, despite respondent's undertaking to provide same, was supported by substantial evidence and that it was error for the Court of Claims to ignore that evidence" (Pet. 4). The evidentiary issue thus presented obviously does not warrant review by this Court. While petitioner contends that the Court of Claims ignored the evidence in reaching its conclusion that the administrative action was supported by the record and that petitioner was given proper training, we can see no occasion for this Court to undertake to reevaluate the

evidence. Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. Furthermore, petitioner's argument ignores the limited scope of judicial review in employee discharge cases. Thus, it is well settled that the courts are not to review the merits of a decision to suspend or remove a government employee and that the only issue properly reviewable is whether the action taken was in accordance with applicable procedures and not inconsistent with statutory requirements or constitutional rights.[2]

3. Petitioner also contends (Pet. 5–6) that the description of the I.R.S. training program in a recruiting circular constituted an offer which, once accepted by petitioner, bound the United States contractually. That contention is contrary to familiar principles of contract law. Circulars and advertisements are not normally considered to be offers but rather are methods of attracting interested parties. See *A. E. Staley Mfg. Co.* v. *Northern Cooperatives, Inc.*, 168 F. 2d 892 (C.A. 8); *Harvey* v. *United States*, 8 Ct. Cl. 501; *Montgomery Ward and Co.* v. *Johnson*, 209 Mass. 89, 95 N.E. 290; Corbin, *Contracts* § 28; Williston, *Contracts*, § 27; cf. *Refinery Equipment, Inc.* v. *Wickett Refining Co.*, 158 F. 2d 710 (C.A. 5). In all events, it was unnecessary for the Court of Claims to determine whether the United States was contractually bound by the terms of the recruiting circular since it

[2] *Brown* v. *Zuckert*, 349 F. 2d 461 (C.A. 7), certiorari denied, 382 U.S. 998; *Seebach* v. *Cullen*, 338 F. 2d 663 (C.A. 9), certiorari denied, 380 U.S. 972; *McTiernan* v. *Gronouski*, 337 F. 2d 31 (C.A. 2); *Saggau* v. *Young*, 240 F. 2d 865 (C.A.D.C.); *Haynes* v. *Thomas*, 232 F. 2d 688 (C.A.D.C.).

held that there was "no substance" to the claim that petitioner was not given proper training (Pet. App. A-1).

For the foregoing reasons the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967